(1)

Supreme Court, U.S.
FILED
99 675 OCT 19 1999
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

HANS WAHL, PETITIONER

VS.

SAN DIEGO SHEET METAL WORKS, DENNIS BAILEY, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE, STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

William J. Ward, Esq.
Law Offices of William J. Ward
The Plaza La Jolla Village
4330 La Jolla Village Drive, Suite 330
San Diego, California 92122
(858) 453-5033

QUESTION(S) PRESENTED

1. The California Court did not rely upon federal authority interpreting Title VII when dealing with the issue of good faith belief of discrimination in a retaliation case. Rucker v. Higher Education Aids Bd. (7th Cir. 1982) 669 F.2d 1179, Holland v. Jefferson Nat. Life Ins. Co. (7th Cir. 1989 883 F.2d 1307, Jenkins v. Orkin Exterminating Co., Inc., (E.D. Tex. 1986) Miller v. Fairchild Industries, Inc. (9th Cir. 1989) 885 F.2d 498

2. There is no California Supreme Court decision on the issue of reasonable belief by the victim who reports harassment in a retaliation case. This has resulted in conflicting decisions in California where there is federal authority governing this issue under Title VII.

3. When there is a triable issue of fact under Title VII on the

issue of severity of harassment, summary judgment is not proper. Meritor Savings Bank v. Vinson (1986) 477 U.S. 57 This rule should apply to same-sex cases.

4. Whether or not the Miller v. Fairchild, supra, ruling regarding retaliation claims and good faith belief applies to a same sex harassment case. Oncale v. Sundowner Offshore Services, Inc. (1998) 118 S.Ct. 998

TABLE OF CONTENTS

OPINIONS BELOW.....pg. 1

JURISDICTION.....pg. 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....pg. 2

STATEMENT OF THE CASE.....pg. 4

REASONS FOR GRANTING THE WRIT.....pg. 9

CONCLUSION.....pg. 26

INDEX TO APPENDICES

APPENDIX A: California Supreme Court's Denial of Petition for Rehearing

APPENDIX B: Court of Appeal, Forth Appellate District, Division One, State of California Order Denying Rehearing

APPENDIX C: Affirmation By Court of Appeal of Superior Court Judgement

APPENDIX D: San Diego Superior Court Order Granting Summary Adjudication/ Summary Judgement

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

1. Anderson v. Liberty Loggy pg.21
   (1986) 477 U.S. 242
2. Barber v. Marina Sailing, Inc. pg.20
   (1995) 36 Cal.App. 4th 558
3. Bernstein v. Consolidated Amer. Ins., Co. pg.21
   (1995) Cal.App. 4th 763
4. Bunzel v. American Acad. Of Orthopaedic pg.20
   (1980) 107 Cal.App.3d 165
5. Brantley v. Pisaro pg.20
   (1996) 42 Cal.App. 4th 1501
6. Carr v. Allison Gas Turbine Div. General Motors pg.23
   (7th Cir.1994) 32 F.3d. 1007
7. Cohen v. Disner pg.20
   (1995) 36 Cal.App. 4th 855
8. Easton v. Crossland Mortgage Co. pg.23
   (C.D.Cal. 1995) 905 F. Supp. 1368

9. Flait v. North American Watch Co. pg.10,11,21,23

(1992) 3 Cal App. 4th at 467

10. Harris v. Forklift Systems, Inc pg.25

(1993) 510 U.S. 17, 21

11. Holland v. Jefferson Nat.Life Ins., Co. pg.10

(7th Cir. 1989) 883 F.2d 1307

12. Hopkins v. Baltimore Gas & Electric ..... pg. 25

(4th Cir. 1996) 77 F.3d 745

13. Jenkins v. Orkin Exterminating Co., Inc ..... pg. 10

(E.D. Tex. 1986) 646 F. Supp.1274

14. Katz v. Chevron Corp. pg.20

(1994) 22 Cal.App. 4th 1352

15. Kelly-Zurian v. Wohl Shoe Co. Inc. pg.23

(1994) 22 Cal.App. 4th 397, 409

16. Matsushita Elect. Industrial Co. v.

Zenith Radio Corp. pg.21

(1986) 475 U.S. 574

17. Melamed v. City of Long Beach pg.20

(1993) 15 Cal.App. 4th 70

18. Miller v. Fairchild Industries Inc. ..... pg 10,12,19

(1989) 9th Cir. 855 F.2d 498, 506

19. Oncale v. Sundowner Offshore Services ..... pg 12,24

(1998) 118 S.Ct. 998

20. Romano v. Rockwell International, Inc ..... pg 9

14 Cal.4th 479

21. Rucker v. Higher Educational Aids Bd ..... pg 9

(7th Cir. 1982) 669 F.2d 1179

22. Shively v. Dye Creek Cattle Co. ..... pg 20

(1994) 29 Cal App. 4th 1620

23. Tung Pereira v. Schlage Electronics ..... pg 22

(1995) 902 F. Supp.1095

24. WYDA Associates v. Merner ..... pg 20

(1996) 22 Cal App. 4th 1702

STATUTES AND RULES

42 U.S.C. Section 2000e-3(a)

California Government Code, Section §12920 eet seq.

OPINIONS BELOW

The opinions below have not been published and have not been designated for publication.

JURISDICTION

Jurisdiction is proper in this case because the issues are based upon federal law and decisions, chiefly Title VII of the Civil Rights Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 704 or the Title VII of the Civil Rights Act of 1964

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

2. California Government Code §12900

§12920. Public policy; employment rights and opportunities; housing; purpose; police power

It is hereby declared as the public policy of this state that it is

necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.

It is recognized that the practice of denying employment opportunity and discrimination in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, or ancestry in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

STATEMENT OF THE CASE

The Petitioner in this action brought claims for same-sex sexual harassment, retaliation, and wrongful termination in violation of the California Fair Employment and Housing Act (California Government Code, Section 12900 et seq.). In short, the Petitioner alleged he was demoted and ultimately constructively discharged, and retaliated against for protesting sexual harassment of himself and subordinates under his supervision by another male employee.

On January 29, 1997, HANS WAHL (hereinafter referred to as Wahl/Petitioner) filed a Complaint for Damages for Wrongful Termination; Sexual Harassment and Discrimination; Negligent Supervision, Training and Hiring; Violation of Personal Rights; Discrimination and Retaliation; Intentional Infliction of Emotional Distress; and Negligent Infliction of Emotional Distress in the San Diego Superior Court, bearing Case No. 707596 (hereinafter sometimes referred to as the "instant case") naming as respondents, SAN DIEGO SHEET METAL WORKS, INC., (hereinafter referred to as "Respondents"), DENNIS BAILEY (hereinafter referred to as "Bailey") and various Doe defendants. All portions

of the relevant filings in Case No. 707596, together with copies of the relevant case law, are part of the Appellant's Appendix. (Appellant's Appendix in Lieu of Clerk's Transcript, hereinafter referred to as App.App., page 1).

The complaint alleged that Petitioner was gainfully employed by the Respondents for over twelve years, being employed for a number of years before being promoted to shop supervisor. (App.App., p. 7, line 7). The Respondents created a hostile work environment by sexually harassing and discriminating against the Petitioner in violation of Respondents' own policies and procedures relating to discrimination and harassment, and the laws of the state of California prohibiting such as well as Title VII of the civil rights act of 1964. (App.App., p. 7, line 22-27; p. 8, lines 1-7). The appellant alleges that he was subjected to vile and sexual language by a male supervisor on a daily basis for months, and, that he complained of this language. (App.App., p.8, lines 7-17). Appellant further alleges that he was retaliated against for protesting the hostile work environment and same-sex sexual harassment, and that he was threatened. (App.App., p. 24, lines 24-27; p. 25, lines 1-5; p. 13,

lines 1-4). Appellant was forced to resign from his position as shop foreman and ultimately his employment with respondents was lost when he could no longer tolerate the treatment. (App.App., p. 17, lines 17-27, p. 15, lines 1-5). The allegations contain facts supporting claims for negligent training along with the intentional infliction of emotional distress. (App.App., p. 21, lines 23-25; p. 26, lines 6-22).

Respondents filed a general denial to the complaint on March 26, 1997. (App.App., p. 30-31) Six Affirmative defenses were raised, including: petitioner failed to mitigate his damage, if any; petitioner's complaint is barred by the exclusivity principle of the Worker's Compensation Act; petitioner's complaint is barred because petitioner is a union member under an operative collective bargaining agreement; petitioner's action is barred, in whole or in part, by the doctrine of unclean hands; petitioner waived any and all claims he may have had against these answering defendants.

After discovery was conducted, Respondents filed a motion for summary judgment. On August 8, 1997, the court, Honorable David J. Danielsen, Judge presiding, granted

respondents' motion for summary judgment. (App.App., p. 427-429). Oral argument regarding the ruling on the summary judgment was held on September 5, 1997 at 8:30 a.m. (App.App., p. 430-448) Respondents' subsequently filed a motion for attorney's fees and sanctions which was denied. (App.App., p. 452-453, 508-509) A notice of Appeal was filed within six months of the Court's ruling on November 24, 1997. (App.App., p. 536-538).

Since the petitioner's wrongful termination and emotional distress claims were based on the sexual harassment and retaliation claims, (all brought under the State of California discrimination laws which fall under California Government Code Sections §12970 et. seq.), these causes of action were also dismissed when the court ruled that the petitioner's claims for retaliation and sexual harassment as a mater of law could not be brought.

The Court erred since there were triable issues of fact on all causes of action, and, the facts of the case clearly deal with sexually suggestive acts. (See Order of Court, App.App., p. 449-451). In addition, a triable issue of fact exists as to whether or

not the petitioner held a "reasonable belief" as to whether or not he was being harassed by a male supervisor and this question is one for the jury, not an issue for summary judgment.

The court additionally erred in its findings that the petitioner "did not believe that he was being harassed on the basis of gender or that the alleged harassment was sexually suggestive in nature" (see Order of Court, App.App., p. 449-451). As more particularly described below in Argument, the testimony of the petitioner does not support this conclusion of the Court. The Court lifted one small line from petitioner's deposition testimony to base this conclusion.

The Court further erred in finding no triable disputed facts for petitioner's hostile work environment and quid pro quo claims under his sexual harassment cause of action. A plethora of disputed facts underlie each of petitioner's causes of action (see Disputed Facts Section, App.App., p. 307-338).

Petitioner appealed the Superior Court's ruling which was denied by the Court of Appeal on June 15, 1999. (Appendix A) The Court of Appeal Denied Rehearing on July 9, 1999. (Appendix B) Petitioner then filed a petition for review of the Opinion of the

Court of Appeal, Fourth Appellate District, Division One, in the Supreme Court of the State of California on July 16, 1999. On September 15, 1999 Appellant's petition for review was denied. (Justice J. Mosk, however, was of the opinion the petition should be granted.).

REASONS FOR GRANTING THE PETITION

I. THE CALIFORNIA COURT DID NOT RELY UPON AND FOLLOW FEDERAL AUTHORITY INTERPRETING A TITLE VII CLAIM FOR RETALIATION

The courts of California have relied upon federal authority when interpreting Title VII in determining the meaning of analogous provision of the FEHA. Romano v. Rockwell International, Inc. 14 Cal.4th 479 The main federal authority that should have found application in the instant case are found in the following four federal decisions. The first is Rucker v. Higher Educational Aids Bd. (7th Cir. 1982) 669 F.2d 1179. In that case the court found that "an employer may not fire an employee because he opposed discrimination against a fellow employee, even if he was mistaken and there was no discrimination. The mistake must be a sincere one and presumably it must be

reasonable." The Holland v. Jefferson Nat. Life Ins., Co. (7th Cir. 1989) 883 F.2d 1307 and Jenkins v. Orkin Exterminating Co., Inc. (E.D. Tex. 1986) 646 F.Supp. 1274 decisions held that the employee may prevail in a discrimination case even if the harassment protested was not sufficiently severe or pervasive so that it altered the employees' work environment and even if the employee had some unarticulated belief that she had not been harassed.

The Miller v. Fairchild Industries, Inc.(9th Cir. 1989) 885 F.2d 498 case held that an employee's belief that he or she was being harassed, and whether such belief was reasonable, in good faith and sincere, is a credibility question that cannot be resolved by summary judgment.

In the immediate case, the California court did not apply this authority neglected to follow a California Appellate court case, Flait v. North American Watch Corp. 3 Cal.App.4th 467 decision that followed and ruled in line with the Miller, Jenkins and Holland cases, supra.

The facts of petitioners case herein are unmistakable that he protested same-sex harassment and was retaliated against,

and ultimately constructively terminated. The California court found that there was no sexual harassment, either quid pro quo or hostile work environment, although both were strenuously argued and the facts heavily supported petitioner's position. The court went on to find that the petitioner's belief that he was being harassed was not reasonable and granted summary judgment thus marking the beginning of this long journey to this court's forum. If the court in California would have followed the federal precedent aforementioned, the petitioner would have had, at the very least, his day in court on the retaliation claim.

II. THERE IS NO CALIFORNIA SUPREME COURT RULING ON THIS ISSUE

The Flait decision, supra, is a California Appellate Court case and there is no California Supreme Court decision dealing with these issues. If a precedent is established at the Supreme court level, then all courts in California would have a standard to follow, and that standard should be based on the federal precedent herein mentioned. Otherwise, and as occurred in this case, the courts will continue to decide harassment cases without

giving the claimants the opportunity to present issues of reasonableness and good faith to a jury. Some of course will apply the Flait ruling and others will not. In the meantime employees, with what they perceive as sexual harassment, whether it be same-sex harassment or not, will be reluctant to protest or blow the whistle for fear that if they are wrong, their jobs may be lost.

III. THE RETALIATION STANDARDS ESTABLISHED IN MILLER v. FAIRCHILD INDUSTRIES, INC. (9TH Cir. 1989) 885 F.2d 498 SHOULD APPLY TO SAME SEX HARASSMENT CASES ONCALE v. SUNDOWNER OFFSHORE SERVICES, INC. (1998) 118 S.CT. 998

The facts in this case surround same-sex harassment, a male supervisor, and a male shop foreman. The previous case law concerning retaliation and the protest of discrimination were not same sex cases. Since the court decided Oncale, supra., new claims are finding their way into the courts and a decision clarifying that the standard found in Miller finds equal application in same sex claims would clear the path of a few less obstacles for the already burdened civil rights claimant.

IV. THERE ARE MANY DISPUTED TRIABLE ISSUES OF FACT UNDER TITLE VII ON THE ISSUE OF SEVERITY OF HARASSMENT WHICH SHOULD HAVE PRECLUDED SUMMARY JUDGMENT IN THIS CASE

A. THE SUPERIOR COURT FOUND THAT PETITIONER'S RETALIATION CLAIMS DID NOT HAVE A REASONABLE BELIEF THAT SEXUAL HARASSMENT HAD OCCURRED. THE APPELLATE COURT CREATED AN ISSUE OF CAUSATION AND DISREGARDED THE FLAIT DECISION

This Appeal was taken from the Superior Court ruling on October 10, 1997 by Judge David J. Danielsen. Judge Danielsen found against the Appellant on the Fifth Cause of Action for Retaliation as follows:

> Plaintiff's Fifth Cause of Action for Retaliation is without merit. The evidence shows that the plaintiff himself did not believe that he was being harassed on the basis of gender or that the alleged harassment was sexually suggestive in nature. The Court further finds that even if plaintiff did believe that he was being harassed on the basis of gender or that the harassment was sexually suggestive in nature, such a belief was unreasonable. (App.App. 0449, 0450, 0451)

At no point did the court rule or find that petitioner's retaliation cause of action failed because he failed to establish any nexus between his complaint of sexual harassment and the resulting conduct of the respondents which resulted in his demotion. Accordingly those points were not addressed on appeal since it was clear that the issue was whether the petitioner had a reasonable belief that the actions constituted

sexual harassment. Notwithstanding, petitioner respectfully requests that this court consider the following analysis.

B. RESPONDENT'S RETALIATION WAS SWIFT AND UNENDING UNTIL PETITIONER'S FINAL DEMOTION

During the March meeting, after receiving petitioner's complaint of sexual harassment, respondents gave petitioner a performance review showing work deficiencies, something he had never received, either orally or in writing, for over twelve years. Also, during his employment there, he received promotions and raises, and was elevated to shop supervisor. Despite Wahl's reporting what he perceived as a violation of the sexual harassment policy, management did not reprimand the Supervisor, (a double standard- employees who violate the policy are reprimanded, management can do as they please), Bailey continued to use the sexually verbose language and continued to come on to Wahl at work, whispering "fucking beautiful" in his ears and also started to blow kisses to him. All of this conduct was adverse to Wahl's employment and served to ratify, condone and continue the sexually harassing conduct and retaliation for

Wahl's complaint.

The language continued on a daily basis after the complaint, Wahl was threatened by Bailey (after the meeting), and Bailey refused to assist Wahl with the alleged work deficiencies. This would establish a reasonable nexus between his complaint of sexual harassment and his negative performance review, the continual harassment and Wahl's demotion and all reasonably connected and continuous. There was no break in the activity of the respondents. In fact, management of the company began to come into the shop area and use the "F" word toward Wahl. The Appellate court mentioned that Wahl never complained after the March meeting, however, what would have been the value of continuing to complain about this language after all these events? It is worth mentioning that no women worked in the shop and that Defendant Bailey admitted in his deposition that he did not use this language in the presence of female employees. (App.App., p. 0295).

Appellant notes that the Appellate court referred to inconsistencies in the record, i.e., Wahl's declaration versus Wahl's deposition, however, Wahl's deposition was corrected to

reflect, "except not in front of women" and his declaration was submitted with his response to the Summary Judgement Motion without any reference by the court that it would be disallowed or not considered. The same is true with Ms. Caronan's declaration which supported the argument that Bailey was not using his language around the female employees and/or towards them. Ms. Caronan was a long term employee of respondent SDSM. Nevertheless, all of this discussion is moot since Bailey admitted in his declaration that the language was not used in the presence of female employees.

A reasonable trier of fact could come to the conclusion that retaliation existed since Management ignored Wahl's protest and complaints of sexual harassment, prompting his negative performance evaluation along with the resulting continuation of sexual vulgarities, insults and threats.

The incidents of retaliation occurred after the report of sexual harassment and continued through Wahl's demotion and ultimate departure from his twelve-year employment. The continuation of the sexual remarks and hostility and harassment went unabated, on a daily basis, after the report of sexual

harassment in the March meeting. Those actions were adverse to Wahl and the work environment was hostile and demeaning.

C. THE PETITIONER REASONABLY BELIEVED SEXUAL HARASSMENT HAD OCCURRED BASED ON THE TRAINING HE HAD RECEIVED AND INFORMATION SUPPLIED TO HIM BY RESPONDENTS, SAID POLICIES BEING ATTACHED TO PETITIONER'S APPEAL AND ARGUED

The report of March 9 described in part the perceived sexual harassment that he and his fellow workers were being subjected to. He was asked to write it by management after he left work because of the sexual language he was being subjected to. The complaint referred to sexual harassment, it referred to the sexual harassment policy of SDSM and referenced a double standard. The fact that Wahl had been previously written up for using the words "that's the way women are", made Wahl painfully aware of the new sexual harassment policy and the language of that policy made it clear to him that sexual language was a violation of that policy and would no longer be tolerated.

Indeed, the policies of SDSM relating to the sexual harassment policy were before the Superior Court, pages 45, 46, 47, &48 of the petitioner's opposition to the respondent's motion

for summary judgement and lodged with this court. (App.App., p. 0200, 0201, 0202, 0203, & 0204). Those policies made it clear that "unwanted sexual advances", "making sexual gestures", "making or threatening reprisals after a negative response to sexual advance", "verbal sexual advances", "verbal conduct", "making or using derogatory comments, epithets, slurs and jokes", "verbal abuse of a sexual nature", "sexually degrading words used to describe an individual" constituted sexual harassment and were banished from the workplace of defendants. This policy embodied the CALIFORNIA SEXUAL HARASSMENT INFORMATION SHEET, a publication of the State of California, Department of Fair Employment and Housing. It described Typical Sexual Harassment Cases filed with the department which included an employee quits because he/she can no longer tolerate an offensive work environment. This occurs when a reasonable person, under like conditions, would believe there was a need to resign to escape the harassment. (App.App., p. 0200).

The defendant's employee handbook went further and stated that "Harassment is defined as unwelcome verbal, visual, or physical conduct that creates an intimidating, offensive, or

hostile working environment or that interferes with work performance" (Emphasis added).

The ruling in Flait v. North American Watch Co. (1992) 3 Cal.App.4th at 467 which held that it was irrelevant to a cause of action for retaliation whether a person was actually subjected to sexual or gender harassment. The key questions are: whether the person had a reasonable and sincere belief that he was subjected to such conduct when he made his complaint, and whether he was retaliated against for his complaint. The court went further and stated that "the issue of whether a plaintiff had a reasonable belief that he was being sexually harassed is a credibility question that cannot be resolved by summary judgment." Flait, supra, 3 Cal.App.4th at 467; see also Miller v. Fairchild Industries, Inc.)9th Cir. (1989) 855 F.2d 498, 506. The California Supreme Court has not ruled on this issue, but Flait has been followed by other jurisdictions and has not been overruled.

D. WHEN A LIBERAL CONSTRUCTION IS APPLIED TO THE PETITIONER'S CASE, THERE ARE A NUMBER OF MATERIAL ISSUES OF FACT

Summary judgment is a drastic measure which deprives the losing party of a trial on the merits. Bunzel v. American Acad. of Orthopaedic (1980) 107 Cal.App.3d 165; WYDA Associates v. Merner (1996) 42 Cal.App.4th 1702. Accordingly, it should be used with caution. Katz v. Chevron Corp. (1994) 22 Cal.App.4th 1352. A motion for summary judgment should only be granted: if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. California Code of Civil Procedure Section 437c; Brantley v. Pisaro (1996) 42 Cal.App.4th 1591 (court cannot simply apply smell test.)

The purpose of summary judgment is not to try the issues, but simply to determine whether there are disputed issues of fact which require the analysis of trial. Melamed v. City of Long Beach (1993) 15 Cal.App.4th 70. If disputed issues of material fact exist, a motion for summary judgment must be denied. Section 437c; Cohen v. Disner (1995) 36 Cal.App.4th 855.

The movant bears the burden of establishing the grounds for summary judgment, and must even demonstrate the absence of triable issues as to claims on which the non-movant would

later have the burden of proof. Shively v. Dye Creek Cattle Co. (1994) 29 Cal.App.4th 1620. Any doubts regarding whether any material, triable issues of fact exist should be resolved against the moving party, and all evidence must be viewed in the light most favorable to the non-movant. Barber v. Marina Sailing, Inc. (1995) 36 Cal.App.4th 558; Flait v. North American Watch Corp. (1992) 3 Cal.App.4th 467, 480. Further, all declarations of the moving party should be strictly construed, while the supporting papers of the non-moving party are entitled to a liberal interpretation. Bernstein v. Consolidated Amer. Ins., Co. (1995) 37 Cal.App.4th 763.

Credibility determinations and weighing of the evidence are solely jury functions. Anderson v. Liberty Loggy, 477 U.S. 242 (1986). Inferences drawn from underlying facts must be viewed in the light most favorable to the nonmoving party. Matsushita Elect. Industrial Co. v. Zenith Radio Corp. 475 U.S. 574 (1986)

After reviewing the supporting and opposing evidence a reasonable jury could find that issues of material fact exist as to whether sexual harassment was directed at Wahl and whether it was sufficiently severe or pervasive to constitute a hostile

working environment. If a trier of fact were to believe Wahl's version of the facts, it could reasonably find that he was subjected to a sufficiently severe and pervasive harassment, enough to alter the conditions of his employment. Tung Pereira v. Schlage Electronics 902 F.Supp. 1095 (1995) In Tung, the court upheld a challenge for summary judgement, state law claims for sexual harassment, and retaliation where the defense was that the sexual language used were isolated incidents and locker room talk. As more fully described below, there are numerous triable issues of fact in this case relating to the sexual harassment, wrongful termination, and retaliation petitioner.

E. THERE IS SUFFICIENT EVIDENCE OF SEXUAL HARASSMENT

There is sufficient evidence to support petitioner's claim of sexual harassment based on a hostile work environment and quid pro quo. A hostile work environment occurs when a person's workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and

create an abusive working environment." Kelly-Zurian v. Wohl Shoe Co., Inc. (1994) 22 Cal.App.4th 397, 409. Key factors are the frequency of the discriminatory conduct, whether the conduct was humiliating, and whether it reasonably interfered with the person's work. Easton v. Crossland Mortgage Corp. (C.D.Cal. 1995) 905 F.Supp. 1368.

A victim does not have to prove the harasser made unwelcome sexual advances. Verbal conduct and visual insults are sufficient. Flait v. North American Watch Co. (1992), 3 Cal.App.4th at 467; Carr v. Allison Gas Turbine Div. General Motors (7th Cir. 1994) 32 F.3d 1007 (cannot dismiss the use of vulgar language as "shop talk").

Here, petitioner was forced to endure pervasive discrimination and abuse. Respondents' admit that Bailey used profanity in front of petitioner and other employees under petitioner's supervision. These actions were on an on-going and continuous basis. Bailey called petitioner "honey" and "girl" in front of co-workers, and sneaked up behind petitioner and whispered "funking beautiful" in his ear on numerous occasions. Bailey even blew kisses to petitioner. The wife swapping

activities of the respondent were also discussed by management with employees and petitioner found those stories offensive and vile. All of this activity in addition to the constant, daily and unrelenting use of the 'F' word in connection with petitioner and the employees he supervised. Further, respondents admit that Bailey continued such conduct even though petitioner complained to Bailey and other high level management personnel, and a meeting was held to discuss Bailey's behavior. Viewing these facts, this certainly is sufficient evidence of a hostile work-environment.

The language Bailey was using for years down at the shipyard, was not the type of language that was supposed to be tolerated back at the shop, and especially in view of the sexual harassment policy. The shop was not the shipyard and the petitioner found this out when he exclaimed "that's the way women are" which resulted in him receiving a write-up. The sexual harassment policy was new, it did not exist years prior so any analogy to past times at the shipyard is not relevant or germane for purposes of this case. A distinction exists between the shipyard and the shop as well. The Oncale v. Sundowner

Offshore Services, Inc.(1998)118 S.Ct. 998, made an applicable analogy when it commented in that opinion that there is no sexual harassment when a coach of a professional football player, smacks him on the buttocks as he leaves the field, even if the same behavior could reasonably be considered abusive and offensive by the coach's secretary, male or female, back at the office. Respondent Bailey was back at the office in this situation, he was no longer in the shipyard. The Harris case stood for the proposition that .all of the circumstances. should be judged from the perspective of a reasonable person in the plaintiff's position. Harris v. Forklift Systems, Inc. (1993) 510 U.S.17,21.

F. THE HARASSMENT OF THE PETITIONER WAS CONTINUOUS AND PERVASIVE

In granting summary judgment against the petitioner relied heavily on Hopkins v. Baltimore Gas & Electric Co. (4th Cir. 1996) 77 F.3d 745. In Hopkins the court found that a hostile work environment did not exist since the events were "temporarily diffuse, ambiguous, and often not directed specifically at (plaintiff) . . . the incidents . . . occurred

intermittently over a seven year period, with gaps between incidents as great as a year." (Emphasis added) The court went on to state that this "suggests the absence of a condition sufficiently pervasive to establish Title VII liability."

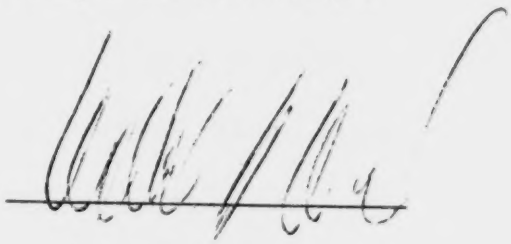
In the instant case, quite the reverse is true. The facts establish sexual profanity, both directed at petitioner as well as his fellow workers, along with the employees whom he supervised, on a daily basis for over a year. The sexual profanity was so continuous and pervasive that the petitioner was forced to plug his ears while on the job. The petitioner suffered emotional distress over this situation, complained to management several times, and walked off the job at least once. For all of his efforts, petitioner was written up, continued to be harassed, and eventually demoted with the option of being fired. Petitioner was retaliated against, humiliated off of a job that he had held for nearly fourteen years.

CONCLUSION

The California courts needed a solid decision to guide all courts of the case when Title VII retaliation issues surfaced in their courts. The federal decisions mentioned herein should have

been applied to the facts of this case which would have surely resulted in the petitioner gaining access to the court for a jury trial on, at the very least, the retaliation. Ample factors exist to establish a reasonable belief from the standpoint of the petitioner, issues of which in the federal courts can not be resolved by summary judgement. This case also has the issue of same-sex harassment which has only recently been a star on the horizon in terms of the focus of Title VII for the civil rights victim to find their way through the courts without this additional obstacle. This case is worthy of this court's review.

Respectfully submitted,

Date: October 13, 1999 By: 

William J. Ward, Esq.
Attorney for Petitioner

No.

IN THE

SUPREME COURT OF THE UNITED STATES

HANS WAHL, PETITIONER

VS.

SAN DIEGO SHEET METAL WORKS, DENNIS BAILEY, RESPONDENT

PROOF OF SERVICE

I Anne Marie Fallon do swear or declare that on this date, October 15, 1999, as required by the Supreme Court Rule 29 I have served the enclosed PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

1. David B. Sharp, Esq.
   550 West "C" Street, Suite 1750
   San Diego, CA 92101

2. Clerk of the Superior Court
   Department 49
   330 West Broadway
   San Diego, CA 92101

3. Clerk of the California Appellate Court
   Fourth Appellate District
   750 B Street, #300
   San Diego, CA 92101-8189

4. Clerk of the California Supreme Court
   Second Floor
   300 South Spring Street
   Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 1999.

Anne Marie Fallon

Anne Marie Fallon

APPENDIX A

Fourth Appellate District, Division One, No. D030062
S080737
IN THE SUPREME COURT OF CALIFORNIA

HANS WAHL, Appellant

v.

SUPREME COURT
FILED
SEP 15 1999
Robert Wandruff Clerk
Deputy

SAN DIEGO SHEET METALWORKS INC. Et Al., Respondents

Appellant's petition for review is DENIED.

Mosk, J., is of the opinion the petition should be granted.

BAXTER

Acting Chief Justice

APPENDIX B

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

HANS WAHL, Plaintiff and Appellant v. SAN DIEGO SHEET METAL WORKS, INC., et al., Defendants and Respondents.	D030062 (Superior. Ct. No. 707596) ORDER DENYING REHEARING

THE COURT:

The petition for rehearing is denied.

"s/Huffman"

HUFFMAN, Acting P.J.

Copies to: All parties

APPENDIX C

NOT TO BE PUBLISHED IN
OFFICIAL REPORTS

COURT OF APPEAL, FOURTH
APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HANS WAHL,	)	D030062
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	(Super. Ct. No. 707596)
	)	
SAN DIEGO SHEET METAL WORKS, INC., et al.,	)	
	)	
Defendants and Respondents.	)	
	)	

APPEAL from a judgement of the Superior Court of San Diego County, David J. Danielsen, Judge. Affirmed.

In this employment, matter, plaintiff Hans Wahl appeals from a summary judgement in favor of defendants San Diego Sheet Metal Works, Inc., and Dennis Bailey (together SDSMW where appropriate). Wahl contends the court erred because he raised

triable issues of material fact regarding sexual harassment as defined in the California Fair Employment and Housing Act (FEHA). (Gov. Code[1], 12900 et seq.) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Wahl has known Bailey for more than 25 years. Wahl worked for SDSMW or an affiliated company for about 15 years and Bailey supervised him for about 10 of those years when they worked on a ship. The men and their wives occasionally socialized outside of work.

In 1993 Wahl became an inside foreman for SDSMW. In 1995 Karl LePiane became the general manager of SDSMW, and Bailey became its vice president of operations. LePiane was Bailey's direct supervisor and Bailey was Wahl's direct supervisor.

---

[1] All statutory references are to the Government Code.

[2] In stating the facts in his appellate brief, Wahl fails to cite to the relevant portions of the record, the papers and evidence before the court on the summary judgement motion. Rather, he cites to evidence he later submitted in opposition to SDSMW's motion for attorney fees and sanctions. While much of the evidence is duplicative, we ignore that which was not before the court at the relevant time.

"By late 1995, (SDSMW) was purposely changing its business direction from a traditional sheet metal job doing small individual contracts. To successfully accomplish that transition there needed to be quality project supervision and strong organization at the foreman level".

By January 1996 LePiane and Bailey had serious concerns about Wahl's job performance. They relayed these concerns to Wahl.

On March 1, 1996, Wahl walked off the job. He told LePiane he left because Bailey called him "honey". LePiane asked Wahl to put his grievances in writing. On March 7 Wahl sent a letter complaining, among other things, that "over the last 4 to 6 weeks I have been subjected to name calling and insults". Wahl said he was called "girl" and "honey". He also said the 'f' word was used in office meetings, and "[i]t bothers me when the 'f' word is used in reference to individuals in the shop". Wahl said the workers were not treated with dignity and respect, but were nagged and criticized. In closing, Wahl assured LePiane he was a dedicated employee and would support management.

Neither LePiane nor Bailey believed Wahl was complaining of sexual harassment. LePiane "viewed the situation as one in which Bailey was frustrated with the job performance of Wahl, a long term acquaintance, and Wahl was unhappy with Bailey's criticisms." LePiane, Bailey, Wahl, and SDSMW's personnel director met on March 11, 1996. Bailey gave Wahl a written list of job requirements, including such things as the "need to be more assertive with responsibilities". Bailey "also apologized to Wahl if he was bothered by [Bailey's] use of the word 'girl' or 'honey.'" After this meeting Wahl made no complaints about Bailey.

Wahl did not meet expectations, and in November 1996 LePiane and Bailey gave him the choice of resigning or accepting a demotion. Wahl opted to become a journeyman, but after working half a day in that position he left SDSMW and never returned. Within two weeks he obtained employment at another sheet metal works.

In January 1997 Wahl sued SDSMW and Bailey for sexual harassment and related claims. He alleged ". . . Bailey engaged in a continuous pattern of gross, outrageous and dehumanizing

sexual discrimination and harassment against plaintiff, and created a hostile work environment. . . Bailey had free rein to repeatedly sexually harass Plaintiff. Bailey continually used his position of power over Plaintiff to use profane language such as 'fuck', 'shit', and 'bitch,' [and] to call such sexually harassing names. . . as 'honey' [and] 'girl.'" SDSMW was allegedly aware of Bailey's harassment but took no corrective action. After conducting discovery, SDSMW successfully moved for summary judgement. The court explained, "[T]he acts for which plaintiff complains do not rise to the level necessary to survive summary judgement on a hostile environment claim. . . The court further finds as a matter of law the acts which created the basis of plaintiff's claims were not sexually suggestive in nature and were not directed at plaintiff because of his gender."

DISCUSSION

I. Standard of Review

Summary judgement is proper only where there is no triable issue of material fact and the moving party is entitled to judgement as a matter of law. (Code Civ. Proc., 437c, subd.(c).) "On review of a summary judgement in favor of the defendant,

we review the record de novo to determine whether the defendant has conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial." (Ann M. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 673-674.) "Inasmuch as a summary judgement is a drastic procedure and should be used with caution [citation], the moving party's papers are liberally construed [citations]." (Sanchez v. Swinerton & Wahlberg Co. (1996) 47 Cal.App.4th 1461, 1465.)

II. Same-Gender Sexual Harassment

The FEHA prohibits employer harassment "because of. . . sex[.]" (§12940, subd. (h) (1).) "Sexual harassment is a form of sex discrimination." (Accardi v. Superior Court (1993) 17 Cal.App.4th 341, 348.) "Sexual harassment by a member of the same sex constitutes gender harassment under the FEHA." (Matthews v. Superior Court (1995) 34 Cal. App.4th 598, 603; Doe v. Capital Cities (1996) 50 Cal.App.4th 1038, 1045.) The prohibited behavior may include unwanted sexual advances or "[v]erbal harassment, e.g., epithets, derogatory comments or slurs[.]" (Cal. Code Regs., tit. 2, §7287.6, subd. (b) (1) (A); Accardi

v. Superior Court, supra, 17 Cal.App.4th at p.348.)

"'California case law recognizes two theories upon which sexual harassment may be alleged. The first is quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances. The second is hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. [Citation.]'" (Doe v. Capital Cities, supra, 50 Cal.App. 4th at p.1045.) While briefing cursorily mentions the quid pro quo theory in his briefing, it is apparent this case involves only hostile work environment claims.

In Oncale v. Sundowner Offshore Services, Inc. (1998) 118 S.Ct. 998, the United States Supreme Court discussed an employee's evidentiary burden in providing a sexual harassment claim, and observed anti-discrimination law is not a "general civility code" [3] (Oncale v. Sundowner Offshore Services, Inc.,

---

3

In Oncale v. Sundowner Offshore Services, Inc., supra, 118 S.Ct. 998, the court held there was a cause of action under Title VII of the Civil Rights Act of 1964 for same gender harassment. "In

supra, 118 S.Ct. at p. 1002.) "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discriminat[ion]. . . because. . . sex[]' [in the]. . . terms or conditions of employment to which members of the other sex are not exposed.'" (Ibid)

> "Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.

---

general, 'The language, purpose and intent of California and federal anti-discrimination acts are virtually identical. Thus, in interpreting FEHA, California courts have adopted the methods and principles developed by federal courts in employment discrimination claims arising under' the federal acts." (Reno v. Baird (1998) 18 Cal.4th 640, 659.)

> But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably fund such discrimination for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women on the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion]. . . because of. . sex.'" (Oncale v. Sundowner Offshore Services, Inc., supra, 118 S.Ct. At p. 1002.)

The court also emphasized ". . . the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' [Citation.] In same-sex (as in all harassment

cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships, which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." (Oncale v. Sundowner Offshore Services, Inc., supra, 118 S.Ct. At p. 1003.)

III. No Triable Issue of Material Fact

A

In its motion for summary judgement, SDSMW argued "[t]here is no evidence that Bailey's comments were sufficiently severe or pervasive to affect Wahl's employment. In fact for 25 years Wahl worked in an environment where similar vulgarities and obscenities were commonplace." SDSMW also argued that

even if Bailey's behavior could be considered harassing, there was no evidence that harassment was "because of" Wahl's gender.

In support, SDSMW submitted excerpts from Wahl's deposition transcript. Wahl testified that when Bailey first supervised him years before, he used obscenities "[o]n a daily basis". Wahl also heard bad language from other persons when he worked on the waterfront. The word "fuck" was used in probably every sentence, and such terms as "motherfucker" and "cocksucker" were also commonly used. Bailey said, "it's common language out there. . . [Y]ou couldn't work out there being offended by this, somebody using this language in relation to a piece of metal". Wahl claimed he complained orally to Bailey and "walked off the ship at least once because of his actions, inhumane treatment, and obscene and vulgar language."

Wahl admitted he used profanity in the workplace but "[n]ever in relation to people". For example, he might say, "'Oh, fuck'" or "'Oh, shit, I made a mistake[.]'" Wahl, however, "never called a person 'motherfucker,' . . . or 'that fucking guy,'" Wahl found Bailey's use of the term "fuck" offensive when it was directed at living things, but not when directed at inanimate

objects. Wahl testified his sexual harassment claims were not based solely upon bailey's obscene language, his referring to Wahl as a "girl" twice and "honey" once, and his whispering in Wahl's ear "fucking beautiful" four or five times over the course of a year.

Bailey declared, "In the sheet metal trade the use of profanity is commonplace. I am unaware of any complaint Wahl ever made of my conduct or language prior to 1996. [¶] . . . My management style is direct, and perhaps confrontational with employees."

In opposition to the motion, Wahl submitted transcript excerpts from other positions of his deposition. Wahl testified that in late 1995 he told Bailey he and the workers under his supervision "don't like to be talked to in an obscene language, [and] words like 'what the fuck you doing here,' that kind of language, was unacceptable." According to Wahl, Bailey acknowledged the use of such language, and he continued to use it "all the time". Wahl said, "I took offense [to] it. And there were times when he used it I had to stick my fingers in my ears so I wouldn't hear it, and [Bailey] saw that."

Once Bailey said to Wahl and another employee, "'Come on girls,'" when he wanted them to go into the shop. The next day Bailey said, "'Come on, honey'" to Wahl. Bailey also "blew some kisses" to Wahl a couple of times. About four or five times Bailey whispered, "'Fucking beautiful'" in Wahl's ear. When asked whether he thought that was "a sexual come-on". Wahl responded, "I believe so." After being called 'honey' and 'girls', When asked whether he thought Bailey wanted to have sex with him, Wahl responded, "I don't know what. . . Bailey wanted."

Bailey also referred to a male employee as "'Mrs. Riggs'", and referred to employees as "motherfucker", "son-of-a-bitch" and "[w]orthless piece of human being, worthless shit." Once Bailey raved in front of Wahl, "If these fucking guys out there are not going to shape up soon I'm going to fire every one of them."

Wahl submitted the declaration of Evelyn Caronan, who stated she was employed by SDSMW for a number of years and worked occasionally with Bailey regarding payroll and other matters. She said, "at no time during my employment did Mr. Bailey use vulgar language in my presence or directed towards

me or other female employees. At no time[] did Mr. Bailey use the 'F' word in my presence and I never heard him direct the 'F' word towards or in the presence of other female employees[.]" Wahl also submitted a declaration stating he never heard Bailey use foul language in front of SDSMW's female employees. However, he failed to reference either declaration in his separate statement and thus the trial court was not required to consider them. (See Maryland Casualty Co. v. Bailey & Sons, Inc. (1995) 35 Cal.App.4th 856, 870, fn.11.)

In any event, when asked in deposition whether Bailey used obscene and vulgar language in the presence of female secretaries, Wahl said, "Correct". When asked whether Bailey "would use the vulgarities and obscenities in front of both women and men". Wahl answered, "Yes, sir." We disregard declaration at odds with previous deposition testimony. (Visueta v. General Motors Corp. (1991) 234 Cal.App.3d 1609, 1613.)

Summary judgement is proper on a sexual harassment claim where the employee provides no evidence the employer's objectionable conduct was connected with gender. (Hart v. National Mortgage & Land Co. (1987) 189 Cal.App.3d 1420, 1426 [ir

same-sex harassment suit, summary judgement was proper where there was no evidence supervisor's sexually suggestive gestures and crude remarks were "because of" employee's gender]; see also, Gallant v. Board of Trustees of California State University (N.D. Cal. 1998) 997 F.Supp. 1231, 1235.) Here, no evidence suggests Bailey's conduct was motivated by gender-based animus or hostility to the presence of men in the workplace. (Oncale v. Sundowner Offshore Services, Inc., supra, 118 S.Ct. at p. 1002.) Moreover, Wahl failed to properly submit any evidence of disparate treatment of the sexes, and in deposition he clearly testified Bailey used obscenities and vulgarities in the presence of both male and female employees.

Additionally, while Bailey's behavior was coarse and boorish, from an objective perspective it was not sufficiently severe to alter the terms or conditions of employment in a significant way. (Meritor Savings Bank v. Vinson (1986) 477 U.S. 57,67.) Wahl readily admitted he used vulgar language himself, and such was the norm in the sheet metal industry , a male dominated trade. He conceded one could not work in the industry without being able to withstand foul language on a

constant basis.

Further, Bailey was married and he and his wife occasionally socialized with Wahl and his wife. There is no indication Bailey's calling Wahl and other male employees "honey" or "girl" was fueled by sexual desire, and the words are not imbued with sexual overtones. Rather, it appears Bailey used such terms to insult his subordinates in an unenlightened and misguided effort to get them to perform. While discomfiting, again the anti-discrimination statutes are not a "general civility code for the American workplace." (Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. at p. 1002.)

At any rate, Bailey referred to Wahl as "honey" or "girl" only three times, and whispered "fucking beautiful" in his ear four or five times over the course of a year. 'Incidentally, the employees's working conditions to the extent demanded for liability. Discourtesy or rudeness, 'offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in "terms and conditions of employment"'. (Indest v. Freeman Decoratiing, Inc. (1999) 164 F.3d 258, 264.)

In sum, Wahl produced no evidence "that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex.'" (Oncale v. Sundowner Services Inc., supra, 118 S.Ct. at p. 1002.) Under all the circumstances, no reasonable jury could have found in Wahl's favor; summary judgement was thus proper.

B

Wahl contends his count for retaliation under FEHA survives because it is not based upon "whether a person was actually subjected to sexual or gender harassment." We are unpersuaded.

It is unlawful under the FEHA for an employer to "discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (§ 12940, subd.(f).) "To establish retaliation [citation], the plaintiff must prove he or she was engaged in protected activity, the employer subjected him or her to an adverse employment action, there was a causal link between the protected activity and the

employer's action and the defendant's proffered non-retaliatory explanation was a pretext for the illegal consequence." (Soldinger v. Northwest Airlines, Inc. (1996) 51 Cal.App. 4th 345, 367.)

Wahl failed to establish any nexus between his March 7, 1996, letter to LePiane, in which he complained about Bailey, and his demotion to foreman more than eight months later.[4] In support of the summary judgement motion, LePiane and Bailey declared Wahl was demoted due to inadequate job performance. It is undisputed that SDSMW did not consider Wahl's letter to be a complaint regarding sexual harassment, and it was not mentioned during management's discussions regarding Wahl's demotion. Moreover, Wahl admitted that after he wrote the letter to LePiane, he never complained about it again. The mere fact that the demotion followed a complaint letter by several months

---

[4] We reject the notion SDSMW's negative comments about Wahl's work performance at the March 11, 1996, meeting constituted discrimination within the meaning of section 12940, subdivision (f).

is insufficient to establish causation.[5]

---

[5] Wahl does not contend his other counts (wrongful termination, negligent supervision, violation of personal rights and negligent and intentional infliction of emotional distress) have any viability and thus we do not discuss them.

DISPOSITION

The judgement is affirmed. Appellant to pay respondents' costs on appeal.

.s/ Nares.

Nares, J.

WE CONCUR:

.s/ Huffman.

Huffman, Acting P.J.

.s/ O'Rourke.

O'Rourke, J.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

HANS WAHL, Plaintiff, v. SAN DIEGO SHEET METAL WORKS INC., a California corporation; DENNIS BAILEY, an individual; and DOES 1 through 20, inclusive, Defendants.	Case No: 707596 I/C Judge: Danielsen Dept: 49 ORDER GRANTING SUMMARY ADJUDICATION/SUMMARY JUDGEMENT

On September 5, 1997, defendants' motion for summary judgement/ summary adjudication came on for hearing before this court in Department 49, the Honorable David J. Danielsen, Judge presiding. William J. Ward appeared on behalf of plaintiff Hans Wahl and David B. Sharp appeared on behalf of defendants San Diego Sheet Metal Works, Inc., and Dennis Bailey.

After full consideration of the evidence, the separate statements submitted by each party, the authority submitted by counsel, and oral argument of counsel, the court finds there are

no triable issues of material facts as to plaintiff's first, second, third, fourth, fifth, sixth, and seventh causes of action asserted in plaintiff's complaint and that summary adjudication on each cause of action should be granted for the following reasons:

1. Plaintiff's First Cause of Action for Wrongful Termination in Violation of Public Policy has no merit because the public policy allegedly violated sexual harassment and gender discrimination and the Court finds as a matter of law that the acts alleged and forming the basis of that cause of action were not sexually suggestive in nature and were not directed at plaintiff because of his gender and there is no actionable sexual harassment or gender discrimination;

2. Plaintiff's Second Cause of Action for Sexual Harassment and Discrimination is without merit as a matter of law because the acts which form the basis of plaintiff's claim for sexual harassment and discrimination were not sexually suggestive in nature and were not directed at plaintiff because of his gender;

3. Plaintiff's Third Cause of Action for Negligent Supervision, Training and Hiring is barred by Workers'

Compensation Exclusively Principle because there was no violation of Government Code 12940 and hence Government Code 12940(l) has no applicability;

4. Plaintiff's Fourth Cause of Action for Violation of Personal Rights, Civil Code 43, is without merit because Section 43 does not create a separate right of action, rather it merely states a broad principle to which the specific causes of action described in other parts of the Civil Code may be maintained;

5. Plaintiff's Fifth Cause of Action for Retaliation is without merit. The evidence shows that the plaintiff himself did not believe that he was being harassed on the basis of gender or that the alleged harassment was sexually suggestive in nature. The Court further finds that even if plaintiff did believe that he was being harassed on the basis of gender or that the harassment was sexual in nature, such a belief was unreasonable.

6. Plaintiff's Sixth and Seventh Causes of Action for Intentional and Negligent Emotional Distress are barred by the Workers' Compensation Exclusively Principle given that Government Code 12940(l) is inapplicable because there is no harassment or discrimination, as a matter of law.

IT IS THEREFORE ORDERED that summary adjudication as to each and every cause of action is granted and defendants' motion for summary judgement is granted and judgement shall be entered forthwith in favor of defendants San Diego Sheet Metal Works, Inc., and Dennis Bailey and against plaintiff Hans Wahl.

Date: 10/10/97

By: "s/ David J. Danielsen"

JUDGE OF THE SUPERIOR COURT

DAVID J. DANIELSEN

PREPARED BY DAVID B. SHARP:

APPROVED:

Date:_____ By:_____

William J. Ward
Attorney for Plaintiff